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ATTORNEY FOR APPELLANT:

MICHAEL C. BORSCHEL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

STEPHEN R. CREASON
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BRYAN ELLIS,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0602-CR-142

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey Marchal, Judge Pro Tempore
Cause No. 49G06-0508-FB-145687

February 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Bryan Ellis appeals his sentence for conspiracy to commit robbery as a class B felony.¹ Ellis raises one issue, which we revise and restate as whether Ellis's sentence is inappropriate in light of the nature of the offenses and the character of the offender. We affirm.

The relevant facts follow. On August 24, 2005, Ellis was involved in two robberies in Marion County. After exiting their vehicle, Jose Barbosa² and his girlfriend were confronted by Ellis and another individual, who were armed with a handgun. The assailants told Barbosa to give them his wallet, and he complied. Officers from the Marion County Sheriff's Department responded to the scene, and Barbosa identified Ellis as the person who pulled the gun on him and took his wallet. Officers also responded to a second robbery on August 24th with the same description of suspects. The victim in the second robbery identified Ellis as being the person who placed a gun to his head during the robbery.

The State charged Ellis with two counts of robbery as class B felonies;³ two counts of carrying a handgun without a license as class A misdemeanors;⁴ dangerous possession of a handgun as a class A misdemeanor;⁵ and one count of criminal confinement as a

¹ Ind. Code §§ 35-41-5-2 (2004); 35-42-5-1 (2004).

² In the trial transcript, the victim's name is spelled "Barbosa," but in the probable cause affidavit it is spelled "Varvosa." For simplicity, "Barbosa" will be used throughout this opinion.

³ Ind. Code § 35-42-5-1 (2004).

⁴ Ind. Code § 35-47-2-1 (2004).

⁵ Ind. Code § 35-47-10-5 (2004).

class B felony;⁶ battery as a class C felony;⁷ and pointing a firearm as a class D felony.⁸ Ellis agreed to plead guilty to conspiracy to commit robbery as a class B felony in exchange for the State dismissing all other counts and a sentencing cap of ten years executed.

At the sentencing hearing, the trial court found Ellis's history of delinquent activity to be an aggravator. In addition, the court found it to be considerable that "not only does [Ellis] have a true finding but he has a true finding for the same offense essentially, robbery and this just happened in January of 2003." Transcript at 28. In mitigation, the trial court noted Ellis's acceptance of responsibility, his cooperation with the State, the fact that he avoided the cost and necessity of a trial, and the fact that Ellis was only eighteen years old. The trial court found that the aggravators and mitigators were in equipoise and that the advisory term was warranted. The trial court sentenced Ellis to ten years with five years executed in the Indiana Department of Correction and five years suspended.

The issue is whether the advisory sentence⁹ imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is

⁶ Ind. Code § 35-42-3-3 (2004).

⁷ Ind. Code § 35-42-2-1 (2004).

⁸ Ind. Code § 35-47-4-3 (2004).

⁹ Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3.

inappropriate in light of the nature of the offense and the character of the offender.” “Although appellate review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied.” Patterson v. State, 846 N.E.2d 723, 731. (citing Purvis v. State, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005), trans. denied). The nature of Ellis’s offense and his character do not lead us to believe that his sentence is inappropriate.

Our review of the nature of the offense reveals that Ellis entered into an agreement to commit robbery. During the course of the crime, Ellis, armed with an unlicensed handgun, placed that gun to the head of his victim and took his wallet. Our review of the character of the offender reveals that Ellis, prior to the present offense, has shown himself to be nonresponsive to prior rehabilitation efforts. Ellis committed the present crime only one year after his release from the Department of Correction. His prior incarceration was the result of a true finding by a juvenile court that Ellis committed an armed robbery, not unlike the present offense. Ellis was seventeen years old at the time of the present offense and had, since his arrest, obtained his GED, secured employment, and was maintaining his own household. However, we must agree with the trial court’s assessment that Ellis’s post-arrest behavior does not negate the adult crime he committed. After due consideration of the trial court’s sentence, we conclude that Ellis’s advisory sentence is not inappropriate. See, e.g., Reyes v. State, 848 N.E.2d 1081, 1083 (Ind. 2006) (holding that the nature of the offense and character of the defendant did not justify revising his sentence).

For the foregoing reasons, we affirm Ellis's sentence for conspiracy to commit robbery.¹⁰

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur

¹⁰ Ellis argues that his sentence is disproportionate to the severity of the crime, and therefore constitutes a violation of the Indiana Constitution, Art. I, §§ 16 and 18. "Determining the appropriate sentence for a crime is a function properly exercised by the legislature." Teer v. State, 738 N.E.2d 283, 290 (Ind. Ct. App. 2000), trans. denied.

This court will not disturb the legislature's determination unless there is a showing of clear constitutional infirmity. In other words, we will not set aside a legislatively sanctioned penalty because it might seem too severe. Rather, a sentence may be unconstitutional by reason of its length, if it is so severe and entirely out of proportion to the gravity of offense committed as to shock public sentiment and violate the judgment of a reasonable people.

Id. (internal citations omitted).

Conspiracy to commit robbery as a class B felony carries an advisory sentence of ten years, with up to ten years added for aggravating circumstances and up to four years subtracted for mitigating circumstances. Ind. Code § 35-50-2-5 (2004), as amended by Pub. L. No. 71-2005, § 8 (April 2005). The trial court sentenced Ellis to ten years with five years suspended. He can potentially be out of prison in less than three years. We cannot say that this sentence shocks the public sentiment or violates the judgment of reasonable people. See, e.g., Teer, 738 N.E.2d at 290.